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No. 97-____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a non-resident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA – DIVISION NO. 1

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Should the U.S. Supreme Court's holding in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), be reconsidered?

Does the federal constitution bar a state from predicating the progressive rate at which nonresidents pay State income tax upon their total income, wherever earned, including extraterritorial income from a source having no nexus to the State?

Did the court below err in holding that an amendment to Section 2362 of the Oklahoma Tax Code, which discriminates against nonresidents by indirectly taxing their extraterritorial income from a source having no nexus to the State does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, *ex rel.*, OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA–DIVISION NO. 1

PETITION FOR WRIT OF CERTIORARI

Petitioners Governor Frank Keating and Ken Feagins ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of Oklahoma–Division No.1 – in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oklahoma below, dated August 23, 1996, is reported at 935 P.2d 398 (Okla.Ct.App. 1996); App. 1a.[1] The Order and Judgment

[1] "App." refers to the appendix filed with this Petition for a Writ of Certiorari.

of the District Court of Oklahoma County of the State of Oklahoma below, dated January 30, 1995, is reproduced at App. 9a. The Order of the Oklahoma Supreme Court denying Certiorari, dated March 5, 1997, is reproduced at App. 13a. The dissenting opinion of Oklahoma Supreme Court Justice Hodges, dissenting from denial of certiorari, dated March 5, 1997, is reproduced at App. 14a.

JURISDICTION

The Oklahoma Supreme Court denied Certiorari on March 5, 1997. On May 23, 1997, Justice Breyer extended the time to file this Petition for a Writ of Certiorari ("Petition") to and including July 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case invokes the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, which provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law".

The statute which Petitioners seek to have declared unconstitutional is Section 2362 of the Oklahoma Tax Code ("Section 2362")[2], which provides in relevant part:

> "For tax years beginning on or after January 1, 1994, the Oklahoma taxable income of a . . . nonresident individual . . . shall be calculated . . . as if all income were earned in Oklahoma.

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[2] 68 O.S. 1991, § 2362 is reproduced in relevant part in *Walters II*, *infra*, at App. 2a.

> Using Oklahoma income tax rates, . . . nonresident individuals . . . shall compute their tax liability on the amount computed in the preceding paragraph.
>
> From the liability computed there shall be deducted all allowable credits to determine the amount of tax due.
>
> . . . nonresident individuals . . . shall divide adjusted gross income from Oklahoma sources by the adjusted gross income from all sources to arrive at the applicable percentage that Oklahoma adjusted gross income represents of all adjusted income received by the taxpayer in the income year.
>
> . . . nonresident individuals . . . shall multiply the amount of Oklahoma tax computed by the applicable percentage calculated in the preceding paragraph in order to determine the amount of income tax which must be paid to the State of Oklahoma. Nothing in this section shall be construed to allow for greater than one hundred percent (100%) of a taxpayer's income to be taxed. . . ."

STATEMENT

This Petition seeks certiorari to review a judgment of the Court of Appeals of the State of Oklahoma–Division No. 1, which held that Section 27 of S.B. 1121, which amended Section 2362 of the Oklahoma Tax Code, was not unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause or the Commerce Clause of the United States Constitution. In this Petition, only review pursuant to the Due Process Clause is sought.[3] Section

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[3] The Court recently granted certiorari in a separate case involving state taxation of nonresidents, *Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996) ("*Lunding*"). The Petitioners in *Lunding* "seek to have declared unconstitutional Section

27 of S.B. 1121 amended Section 2362 of the Oklahoma Tax Code to change the method of calculating the state income tax liability of nonresident individuals and part-year resident individuals.[4]

The procedural history of the case is correctly summarized in the opinion below of the Court of Appeals of the State of Oklahoma–Division No.1. Challenges to Section 2362 on federal constitutional grounds explicitly were raised by Petitioners at all stages of the proceedings in the courts below. *See Walters et al., v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 935 P.2d 398, 400 (Okla.App. 1996), *cert. denied*, (Okla. March 5, 1997) ("*Walters II*"), reproduced at App. 1a; Summary Judgment of the District Court, C.J.-94-4997-64 (January 30, 1995), reproduced at App. 9a.

The relevant facts are quite simple and are set forth in *Walters II*. Senate Bill 1121 was enacted by the Oklahoma Legislature in 1994. Among other things, it amended Section 2362 of the Oklahoma Tax Code to change the method of calculating state income tax for nonresident individuals. *See Walters II*, 935 P.2d at 399-400, reproduced at App. 9a. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Okla-

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631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." The constitutional provision relied on by the Petitioners in *Lunding* is the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2.

[4] Although Section 2362 of the Oklahoma Tax Code applies to both nonresidents and part-year residents, this Petition addresses only nonresidents.

homa. *See Walters II*, 935 P.2d at 400; App. 2a-3a. Section 27 of S.B. 1121 amended Section 2362 to predicate the Oklahoma progressive income tax rate applicable to nonresidents on their total income, wherever earned, to calculate their Oklahoma income tax liability. Pursuant to Section 2362, the calculation of nonresidents' Oklahoma income tax liability currently takes into account income earned outside of Oklahoma from a source having no nexus with either the State or the benefits and protections afforded thereby. It is conceded that the exaction is, subsequently, prorated according to the percentage of the nonresident taxpayer's income earned in Oklahoma. *See Walters II*, 935 P.2d at 399-400; reproduced at App. 2a-3a. Nonetheless, the initial computation using income from sources having no nexus with the State serves to place the nonresident taxpayer in a higher tax rate.

It is undisputed that prior to the enactment of Section 27 of S.B. 1121, the Oklahoma Tax Commission predicted that the amendment to Section 2362 would raise an estimated 18 million dollars per year in additional revenue. *See Walters II*, 935 P.2d at 401, reproduced at App. 5a. The formalistic euphemism placed on the amendment in anticipation of the 18 million dollar per year increase in exactions from nonresident taxpayers was "tax equity." It contended that "§ 27 does not impose a tax on such out-of-state income, but merely uses that income in calculating the rate at which Oklahoma-derived income shall be taxed." However, at least one member of the Oklahoma Supreme Court has acknowledged that "[t]he **effect of Senate Bill 1121 is to increase the taxes of a significant number of nonresidents and part-time residents.**" *Compare Walters II*, 935 P.2d at 400 & 402 (emphasis added), reproduced at App. 3a & 7a, *with*, dissenting opinion of Oklahoma Supreme Court Justice Hodges in *Walters II*, dissenting from denial of certiorari, reproduced at App. 15a.

It is conceded that Section 27 of S.B. 1121 does not necessarily mandate an increase in the Oklahoma income tax liability of all nonresidents. If a nonresident taxpayer suffers

losses from his or her out-of-state business, the nonresident's Oklahoma income tax liability would actually be decreased. *See Walters II*, 935 P.2d at 401, reproduced at App. 5a.

In order to appreciate fully the genesis and context of the matters raised in this Petition, it is necessary to place in historical context the specific holding of *Maxwell v. Bugbee*, 250 U.S. 525 (1919). *See also Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937). In addition, it is necessary to understand Justice Holmes' dissenting opinion in *Maxwell* as it relates to the current practical operation of, and economic realities visited upon, nonresident taxpayers by Section 2362 of the Oklahoma Tax Code. Similar progressive state income tax statutes which take into account nonresidents' extraterritorial income from a source having no nexus to the taxing jurisdiction have been upheld under *Maxwell*, a privilege death tax case.

In *Maxwell*, the United States Supreme Court adopted a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey progressive inheritance statute in *Maxwell* calculated the rate of tax by including the nonresident decedent's entire estate, wherever located, including extraterritorial property located outside of New Jersey. The statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Compare Walters II*, 935 P.2d at 399-400, reproduced at App. 2a-3a, *with, Maxwell*, 250 U.S. at 532-33. In *Maxwell* a divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the challenges to the statute pursuant to various provisions of the federal constitution, including the Due Process Clause.

In rejecting the due process argument that an economic reality of the statute was an increase in exaction and an

extraterritorial tax which resulted in a deprivation of nonresident decedents' property without due process in violation of the Fourteenth Amendment to the U.S. Constitution, five members of the divided Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a *privilege* to succeed to property which is within the jurisdiction of the State.
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. . . . The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon the foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the divided *Maxwell* Court, including Justice Holmes, rejected the majority's formalism. They applied an economic realities and practical operation approach to the statute and determined that New Jersey's inclusion of property beyond its jurisdictional borders in the calculation of the exaction from the nonresident decedents amounted to an indirect tax on the extraterritorial property. This approach focused on the *practical operation* of the statute and its corresponding economic realities upon nonresident taxpayers. Pursuant to this approach, the New Jersey statute effected an indirect tax and deprivation upon nonresident decedents' extraterritorial property beyond New Jersey's taxing authority. In effect, it amounted to an unconstitutional deprivation of property without due process. Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

The majority's holding in *Maxwell* has been called into question by both the United States Supreme Court and commentators. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

It is conceded that several states' highest courts in addition to the court below in *Walters II* and at least one federal court of appeals have recently relied upon *Maxwell* to uphold under various provisions of the United States Constitution state income taxation schemes that operate like Section 2362 of the Oklahoma Tax Code. *See, e.g., Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819

(1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969). *See United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987).

Maxwell was decided in 1919 and was a 5/4 decision. It was decided in a time before commercial airlines, interstate highways and speed limits of 70 m.p.h. made interstate employment opportunities readily accessible to U.S. citizens who must work as nonresidents in neighboring states in order to make a living. The principle of *Maxwell* that extraterritorial values may be used to determine the rate of tax was formulated in connection with a *privilege death* tax in a different historical setting. *Maxwell* was decided 77 years ago. As evidenced by the ongoing controversy and litigation in the courts, *Maxwell* did not address or resolve the Due Process issue raised by this Petition. It did not address or resolve the issue whether a state's indirect tax on a nonresident taxpayer's extraterritorial income from a source having no nexus with the State violates Due Process.

Accordingly, Certiorari should be granted. The Court's holding in *Maxwell* should be reconsidered in light of the changed historical times and circumstances in which it is being implemented. Section 2362 of the Oklahoma Tax Code should be declared unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari in this case should be granted for two reasons, one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals (and several state courts of last resort) and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c). In addition, because of the "con-

tinuing source of controversy and litigation in both state and federal courts" regarding the specific extraterritorial state income taxation problem raised in this Petition, and not addressed by the holding in *Maxwell*, Certiorari should be granted. This Court should reconsider its holding in *Maxwell* under the current circumstances. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 337-38 n.2 (1963); Robert L. Stern *et al., Supreme Court Practice* 209 (7th ed. 1993).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Establishing the existence of grounds to invoke this reason to grant Certiorari are five recent decisions of courts of last resort of States other than Oklahoma, specifically, the State of Missouri, the State of New York, the State of Main, the State of North Carolina, and the State of Vermont; and, a decision by the United States Court of Appeals for the Tenth Circuit. In *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. New York*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 489 U.S. 1096 (1989); and, *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), a state court of last resort adopted the formalistic approach to decision-making used by the majority in *Maxwell* and rejected nonresident challenges under the federal constitution to state income taxation schemes similar to Section 2362. Similarly, the United States Court of Appeals for the Tenth Circuit relied upon the majority holding in *Maxwell* to conclude that "the mere inclusion of military compensation in a formula determining the rate of tax on income from Kansas sources does not constitute a tax on the military income of a

nonresident individual." *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987).

Each court relied upon *Maxwell* and upheld under due process the State's inclusion of nonresidents' total income, wherever earned, including extraterritorial income from a source having no nexus with the taxing jurisdiction, to determine the nonresident taxpayer's state income tax liability.

The majority of the *Maxwell* Court avoided the Due Process challenge by adhering to the type of formalism which was acceptable in 1919. The *Maxwell* majority held that the New Jersey inheritance statute "merely affords a measure of the tax imposed". *Maxwell*, 250 U.S. at 539.

Maxwell, however, was decided in the specific context of a *privilege death tax*. The separate and distinct problem of a State using a nonresident's extraterritorial *income* from a source with *no nexus* to either the taxing jurisdiction or its benefits and protections to determine the *state income tax liability of the nonresident* was not addressed. This specific issue has not been, but should be, settled by this Court.

For example, the court below in *Walters II* stated without analysis:

> "Quite simply, § 27 of S.B. 1121 is not an impermissible attempt to extend the jurisdiction of Oklahoma's taxing authority beyond its borders. *Use of out-of-state income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income.*"

Walters II, 935 P.2d at 402 (emphasis added), reproduced at App. 7a-8a. The Court rejected the formalism approach to decision-making used by the *Maxwell* majority in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940), and replaced it with a "practical operation" and effect approach.

It is well-settled that states have the power to tax *all* the income of its residents, even income earned beyond the borders of the State. *Oklahoma Tax Comm'n v. Chickasaw*

Nation, 115 S.Ct. 2214, 2222 (1995) (*citing New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-313, 57 S.Ct. 466, 467-468, 81 L.Ed. 666 (1937)). However, a taxing jurisdiction such as Oklahoma is more limited in its power to tax the income of nonresidents and must tax only the income derived from sources within the borders of the State. *Id.* at 2222 n.11; *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60, 75, 40 S.Ct. 228, 230, 64 L.Ed. 460 (1919); *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1919).

In *Shaffer*, for example, the Court stated:

> "as to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."

Shaffer, 252 U.S. at 57.

One commentator has observed that the United States Supreme Court has not specifically addressed "whether the fundamental considerations underlying the limitations on a state's jurisdiction to tax a nonresident's income should be translated into corresponding limitations on a state's tax rate structure. *See* Hellerstein, *supra*, 72 Mich.L.Rev. at 1318. The Court, however, recently addressed a similar apportionment issue in the context of multi-state corporations and their "unitary business" income. *See Allied-Signal, Inc. v. Director, Division of Taxes*, 112 S.Ct. 2251 (1992) (*rejecting* a formalistic approach to decision-making and noting that "the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities."). The economic reality for many nonresident taxpayers affected by Section 2362 of the Oklahoma Tax Code regarding the ultimate exaction, or tax, is more money out-of-pocket. *See* App. at 15a (opinion of Oklahoma Supreme Court Justice, Hodges, J., dissenting from Oklahoma Supreme Court denial of certiorari).

Because the United States Supreme Court has never addressed whether the Due Process Clause bars a state from including in a progressive income taxation scheme the extra-territorial income of nonresidents in the calculation of the nonresident's State income tax liability, and several state courts have recently relied on the holding in *Maxwell* to decide this important federal question in the affirmative, Certiorari should be granted and Section 2362 should be declared unconstitutional.

B. The Problem Of A State's Inclusion Of A Nonresident's Out-of-State Income To Calculate The State Income Tax Rate For The Nonresident's In-State Income Tax Liability Has Been A Continuing Source Of Controversy And Litigation In Both State And Federal Courts.

Establishing the existence of grounds to invoke this reason to grant Certiorari is this Court's decision in *Gideon v. Wainwright*, 371 U.S. 335 (1963). In *Gideon*, this Court granted certiorari to review a case that involved an unresolved problem, a defendant's federal constitutional right to counsel in a state court, *Betts v. Brady*, 316 U.S. 455 (1942). Although the specific issue raised in this Petition is vastly different from the issue in *Gideon*, the circumstances regarding the Court's grant of certiorari are similar.

As in this case, the issue presented to the Court in *Gideon* had been a continuing source of controversy and litigation in both state and federal courts. Similarly, the issue presented by Gideon had sparked scholarly commentary. *See Gideon*, 371 U.S. at 338 n.2.

Petitioners currently ask this Court to reconsider *Maxwell v. Bugbee*, 250 U.S. 525 (1919), a split decision decided in 1919. In *Gideon,* this Court reconsidered a prior split decision involving a reoccurring, yet unresolved issue. *Betts* had been decided 21 years prior to *Gideon*. Like *Maxwell*, *Betts* was a divided opinion. Like *Maxwell*, *Betts* had been decided many

years prior to the case before the Court. As in *Maxwell*, *Betts* had not resolved the specific problem raised by the Petitioner. The Court in *Gideon* granted certiorari "[t]o give this problem another review". *Id.*

Accordingly, this Petition for Writ of Certiorari should be granted and *Maxwell* should be reconsidered.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: July 2, 1997.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OF OKLAHOMA
DIVISION NO. 1.

No. 85148
Aug. 23, 1996.
Rehearing Denied Nov. 4, 1996.
Certiorari Denied March 5, 1997.

DAVID WALTERS, Governor of the State of Oklahoma and Ken Feagins, a non-resident individual,

Appellants,

—v.—

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA TAX COMMISSION,

Appellee.

Appeal from the District Court of Oklahoma County; Honorable Leamon Freeman, District Judge.

AFFIRMED.

Stanley M. Ward, Norman, Ken Feagins, Dallas, Texas; Duchess Bartmess, Oklahoma City for Appellants.

Stanley Johnston, Robert B. Struble, Oklahoma City, for Appellee.

MEMORANDUM AND OPINION

CARL B. JONES, Presiding Judge:

Appellants brought this declaratory judgment action against the Oklahoma Tax Commission [the Commission] challenging the constitutionality of Senate Bill No. 1121 [S.B. 1121], which was enacted by the Oklahoma Legislature in 1994. On cross-motions for summary judgment, the trial court rendered judgment for Appellee, and Appellants appeal.

S.B. 1121, among other things, changed the method of calculating state income tax for nonresident and part-year resident individuals. Okla.Sess.Laws 1994, ch. 278, § 27, *see now* 68 O.S.Supp.1994 § 2362.[1] Prior to amendment, § 2362 pro-

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[1] S.B. 1121 amended 68 O.S. § 2362 to read as in pertinent part:

"For tax year beginning on or after January 1, 1994, the Oklahoma taxable income of a part-year resident individual, nonresident individual, a nonresident trust and a nonresident estate shall be calculated . . . as if all income were earned in Oklahoma.

"Using Oklahoma income tax rates, part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall compute their tax liability on the amount computed in the preceding paragraph.

"From the liability computed there shall be deducted all allowable credits to determine the amount of tax due.

"Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall divide adjusted gross income from Oklahoma sources by the adjusted gross income from all sources to arrive at the applicable percentage that Oklahoma adjusted gross income represents of all adjusted income received by the taxpayer in the income year.

"Part-year resident individuals, nonresident individuals, nonresident trusts and nonresident estates shall multiply the amount of Oklahoma tax computed by the applicable percentage calculated in the preceding paragraph in order to determine the amount of income tax which must be paid to the State of Oklahoma. Nothing in this section shall be construed to allow for greater than one hundred percent (100%) of a taxpayer's income to be taxed.

* * *

vided that the taxable income of a nonresident individual, trust, or estate, "shall be the same as if he were a resident individual [etc.]," and established a system by which the taxpayer's adjusted gross income as reported to the federal government was excludable from state taxable income *unless* the income was attributable to ownership of property, conduct of a business, trade, or profession, or other business or property in this state. Income from sources outside Oklahoma was not included in a nonresident's taxable income. S.B. 1121 modified existing law by requiring nonresident and part-time residents to apply the Oklahoma tax rate applicable to their adjusted gross income from all sources (not just income earned in Oklahoma) and calculate their tax liability as if paying Oklahoma income tax on all such taxable income, prorated according to the percentage the Oklahoma taxable income bears to the adjusted gross income from all sources.

The Commission describes the amendment as one which created "tax equity," assuring that nonresidents and part-year residents pay tax on their Oklahoma income based on the rate determined by their total taxable income, just as full-time Oklahoma residents do. Appellants contend that S.B. 1121 was a "revenue bill," and so is unconstitutional because it was enacted contrary to the requirements of Okla. Const., Art. V, § 33.[2] Appellants also contend the bill is invalid under the state

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[2] Section 33, as amended by State Question No. 640 in 1992, provides,

> "A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
>
> "B No revenue bill shall be passed during the last five days of the session.
>
> "C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

(footnote continued)

Constitution because it embraces more than one subject. Okla. Const., Art. V, § 57. In addition, Appellants raise equal protection, due process, and Commerce Clause objections to the bill under the state and federal constitutions.

This appeal is brought under the accelerated procedures of Rule 1.203(A), Rules of Appellate Procedure in Civil Cases, 12 O.S. 1993 Supp. Ch. 15, App. 2. Summary judgment will be affirmed if the record reveals no substantial controversy as to any material fact, and that one party is entitled to judgment, as a matter of law. *See Johnson v. Mid-South Sports*, 806 P.2d 1107, 1108 (Okla.1991). Our review is limited to the record and issues actually presented to the trial court. *Hughey v. Grand River Dam Auth.*, 897 P.2d 1138, 1143 (Okla.1995).

In our review of the trial court judgment we must be guided also by the strong presumption that legislative enactments are constitutional. *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 510, 512 (Okla.1986); *Reherman v. Oklahoma Water Resources Bd.*, 679 P.2d 1296, 1300 (Okla.1984). A legislative act will be upheld against constitutional challenge unless it is clearly, palpably, and plainly inconsistent with our fundamental law *Reherman*, 679 P.2d at 1300. Any question of constitutionality, even in a close case, will be resolved in favor of validity of the legislation. *Leveridge v. Oklahoma Tax Comm'n.*, 294 P.2d 809, 811 (Okla.1956).

At the outset, we reject the Commission's argument that Appellant Walters lacks standing to press a request for declaratory relief in this case. We concede that Walters, as a full-time Oklahoma resident, has no direct interest in the effects of S.B.

"D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in [Art. V, § 58] and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor."

1121 on nonresidents and part-year residents. We find, however, that Walters (whose veto of the bill was overridden) has standing to question whether the bill passes constitutional muster under the one-subject rule in Art. V, § 57. The affidavit of the Governor states that the interests of the state are involved in that the bill is harmful to the interest of the state in attracting new out-of-state business. In this summary judgment proceeding that statement suffices to supply standing in that under the statute, the state's interest is squarely brought before the court. Feagins has standing to press the claim for relief in all respects, and we will not burden this opinion with an extended discussion of the nuances of standing.

The accepted test for a "revenue bill" is the two-pronged analysis stated by the court in *Leveridge*: A revenue bill is one whose principal purpose is to increase state tax revenue *and* which levies a tax in the strict sense. *Leveridge*, 294 P.2d at 811; *see Board of County Comm'rs v. Oklahoma Pub. Empl. Retirement Sys.*, 405 P.2d 68, 72–73 (Okla.1965).[3] The term "has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." *The Nashville*, 17 Fed.Cas. 1176, 1178 (No. 10,023) (D.Ind.1868), quoted in *Anderson v. Ritterbusch*, 22 Okla. 761, 98 P. 1002, 1006 (1908).

Appellants argue that S.B. 1121 satisfies both prongs of the revenue bill test. The Commission estimated that § 27 of the bill would raise approximately $18 million dollars in revenue, the bulk of which would go into the general revenue fund. For the most part, however, the sections of S.B. 1121 were predicted to be revenue-neutral. In fact, the Commission's impact statements showed that two sections of the bill would have a *negative* impact on revenue. Moreover, § 27 would not uniformly increase state taxes for all nonresidents and part-year

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[3] *See, generally*, Ramsey, *What is a "Revenue Bill" Within the Meaning of Our Most Recent Constitutional Amendment*, 63 Okla.B.J. 1567 (1992), discussing the subject following passage of State Question No. 640.

residents. If a taxpayer had losses from out-of-state business (which would reduce federal adjusted gross income), the Commission projected that § 27 would actually result in a decrease in state tax.

It appears, then, that the Commission is correct to characterize S.B. 1121 as merely a change in the way the tax laws are administered. The bill's principal object is not to raise revenue, and it does not levy a tax in the strict sense. That it has the incidental effect of increasing general revenues does not mean make it a revenue bill. The trial court correctly rejected the challenge to S.B. 1121 under Art. V, § 33.

Appellants argue S.B. 1121 is void under Art. V, § 57[4] because it relates, according to its title, to several different subjects: "revenue and taxation, debtor and creditor, intoxicating liquors, motor vehicles and soldiers and sailors." Appellants assert there is no overarching purpose or theme to the divers provisions in the bill. The Commission asserts the common theme of the bill's provisions is administration of the state tax laws.

The purpose of § 57 is to prevent legislative "log-rolling—the enactment of legislation through the combination of unpopular causes with popular legislation on an entirely different subject." *Campbell v. White*, 856 P.2d 255, 258 (Okla.1993); *Bond v. Phelps*, 200 Okla. 70, 191 P.2d 938, 950 (1948); and "veto-proofing" a bill by attachment of a popular rider to an otherwise unpopular bill. *See Johnson v. Walters*, 819 P.2d 694, 697 (Okla.1991). If the bill's provisions are "germane, relative and cognate" to the subject expressed in the title, then the bill satisfies the mandate of § 57. *See Black v. Oklahoma Funding Bond Comm'n*, 193 Okla. 1, 140 P.2d 740, 743 (1943); *Campbell*, 856 P.2d at 260.

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[4] "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statues . . . Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."

The proper construction to be given to the one-subject rule seems to have narrowed somewhat in recent years. *See Campbell*, 856 P.2d at 258-60; and *Johnson*, at 699 (Wilson, J., concurring) (suggesting that strict compliance with § 57 would be required thereafter). In this case, we agree with the trial court that "[e]very provision of the Act in some way deals with enforcement of the tax laws of Oklahoma or provides for a method of reporting or for provisions to be placed on tax forms as the method for donating funds to the State." Appellants have failed to point out any section of the bill which does not relate to the general subject of tax administration: tax liens; filing of a bond with the Commission by persons in liquor business; inspection and registration of vehicles by the Commission or its motor license agents; confidentiality of tax information; approval of bond in lieu of payment of disputed taxes; tax refund claims; estate tax returns and audits; tax exemptions; tax code changes; and the like all relate to the state tax laws and their administration. We hold that S.B. 1121 does not violate the one-subject rule of Art. V, § 57.

Appellants' various other constitutional challenges to S.B. 1121 are based on their contention that § 27 of the bill imposes an indirect tax on income derived outside of the state. The Commission properly responds that § 27 does not impose a tax on such out-of-state income, but merely uses that income in calculating the rate at which Oklahoma-derived income shall be taxed. With that understanding of § 27 in mind, some of Appellants' constitutional arguments are clearly without merit. Appellants claim a due process violation under Okla. Const., Art. II, §§ 2 and 7, and the Fourteenth Amendment to the U.S. Constitution, but they have failed to establish the necessary factual predicate to assert such a claim, because their out-of-state income is not being taxed. The bill does not offend the privileges and immunities clause of the U.S. Constitution, Art. IV, § 2, cl. 1, by taxing the property of persons who are not represented in the Legislature. Quite simply, § 27 of S.B. 1121 is not an impermissible attempt to extend the jurisdiction of Oklahoma's taxing authority beyond its borders. Use of out-of-state

income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income. *See Brady v. State*, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 958, 607 N.E.2d 1060, 1063 (Ct.App.1992), *cert. denied*, 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 692 (1993); *cf.*, *Maxwell v. Bugbee*, 250 U.S. 525, 539, 40 S.Ct. 2, 6, 63 L.Ed. 1124 (1919) (inclusion of entire estate of decedent to calculate inheritance tax rate for property in New Jersey "is in no just sense a tax upon the foreign property.").

Similarly, Appellants' claim that nonresidents and part-year residents are denied equal protection of the laws, in violation of those same constitutional provisions, lacks a factual basis because Appellants have failed to show how they are members of a class which has been treated differently. Appellants are treated no differently than other nonresidents or part-year residents, and the method for determining tax rates based on a taxpayer's total income is not different for nonresidents or part-year residents from the method used for full-time Oklahoma residents.

Appellants' final constitutional attack on S.B. 1121 asserts that it unfairly erects a barrier to interstate commerce in violation of the Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3. Appellants claim the bill places an arbitrary and discriminatory tax burden on foreign income of nonresidents and part-year residents. As we have just observed, however, the bill does not tax foreign income. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), cited by Appellants, is inapposite to the situation presented here. In *Complete Auto Transit*, a motor carrier transporting cars in Mississippi for General Motors brought a Commerce Clause challenge to a "privilege tax" levied by the State of Mississippi. (The Court rejected its challenge.) S.B. 1121 does not purport to tax interstate commerce.

Having reviewed the record and the briefs of the parties, this Court finds that the trial court judgment must be AFFIRMED.

GARRETT and JOPLIN, JJ., concur.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

CJ-94-4997-64
Jan. 30, 1995 P 1:42

DAVID WALTERS and KEN FEAGINS,

Plaintiffs,

—vs—

STATE OF OKLAHOMA *ex rel.*,
OKLAHOMA TAX COMMISSION,

Defendant.

JUDGMENT

On this *26* day of *January, 1995,* the Court having read the extensive briefs submitted by both parties including a review of case law and the Oklahoma Constitution and finds:

This litigation involves Senate Bill 1121 ("Bill") passed by the Oklahoma Legislature during the waning days of the 1994 session. The part of the bill complained of herein is that part dealing with changing the method of calculating Oklahoma Income Taxes levied against non-resident or part-time residents of Oklahoma who have earnings from within Oklahoma for work or services performed in Oklahoma. The challenges raised shall be treated separately.

The first issue to be addressed is whether this bill is a Revenue Bill within the meaning of Article V, Section 33, Sections A, B, C and D. Section A requires that all bills for raising revenue shall originate in the House of Representatives. Section B prohibits the passage of a Revenue Bill during the last five days of the session. Section C requires Revenue Bill passed be submitted to a vote of the people before it can become effective unless under Section D it receives an approval by at least 3/4 vote of both houses of the legislature.

The Court answers the question, as to whether the ("Bill") is a Revenue Bill, in the negative.

The principal object of the ("Bill") complained of herein is the equalization of income taxes between residents and non-residents or part-time residents. Any revenue which might be raised by this ("Bill") would be raised incidentally and the ("Bill") does not levy a tax nor have as its principal object to raise revenue.

Our Supreme Court in Leveridge vs Oklahoma Tax Commission 245 P2d 811 stated that a bill which does not within its four corners levy a tax is not per se a revenue bill. Leveridge involved the removal of an exemption which then subjected property to taxation which had not previously been taxed. This case is closely analogous to Leveridge. The ("Bill") at Bar does not levy a tax but instead changes the method of calculation of income taxes.

Since this Court has determined the ("Bill") is not a revenue raising bill the remaining challenges based upon Article V, Section 33 of the Oklahoma Constitution are without merit and are rejected.

Plaintiff's Proposition Three asserts Senate Bill 1121 addresses more than one subject and thus is violative of Article V, Section 57 of the Oklahoma Constitution.

This proposition of the plaintiff upon careful study of the Act must also be rejected. While this Court at first blush thought the title to be somewhat confusing nevertheless upon careful scrutiny found there to be a common scheme which is

the test to be applied. Every provision of the Act in some way deals with the enforcement of the tax laws of Oklahoma or provides for a method of reporting or for provisions to be placed on tax forms as the method for donating funds to the State. The Court does not find this to be repugnant to Article V, Section 57 of the Oklahoma Constitution.

Plaintiffs next proposition challenges Senate Bill 1121 as Violative of Article II, Sections 2 and 7 of the Oklahoma Constitution.

This proposition must fail as there is no prevention of a persons having the inherent right to life, liberty, pursuit of happiness and the enjoyment of the gains of their own industry, nor does it deprive the plaintiffs of life, liberty or property without due process of law. Senate Bill 1121 is constitutionally acceptable.

The United States Supreme Court has on many occasions upheld the validity of taxing scheme which includes the inclusion of property which is not subject to taxation as a measure of tax imposed on property within the State.

This bill does not tax out-of-state income but merely establishes a method where those non-residents or part-time residents are treated equally with residents and do not receive in the future a tax break not afforded to our residents.

Neither does it violate the Constitution of the United States nor is it repugnant to the Constitution.

It is therefore the Order of this Court that the Plaintiffs Motion for Summary Judgement be and is Denied.

It is further ordered that Defendants Motion for Summary Judgement is sustained and Judgment is entered in favor of the Defendant.

/s/ LEAMON FREEMAN
Leamon Freeman
District Judge

Certificate of Mailing

A Copy of this order was mailed this __ day of January, 1995 to:

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, March 5, 1997

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

85,148 David Walters, Governor of the State of Oklahoma and Ken Feagins, a nonresident individual v. State of Okalhoma ex rel. Oklahoma Tax Commission. Certiorari denied.

CONCUR: Kauger, C.J., Lavender, Simms, Hargrave, Wilson, JJ., Lumpkin, S.J. (sitting in lieu of Watt, J. who certified his disqualification).

DISSENT: Summers, V.C.J., Hodges, J. (separate writing), J. Opala, J., dissenting.

I would grant certiorari to assess the impact of Art. 5, § 33(c) and (d) on this court's opinion in Leveridge v. Oklahoma Tax Commission, 294 P.2d 809 (Okla. 1956).

/s/ YVONNE KAUGER
Chief Justice

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 85,148
Filed
March 5, 1997

DAVID WALTERS, Governor of the State of Oklahoma, and KEN FEAGINS, a nonresident individual,

Appellants,

—vs—

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA TAX COMMISSION,

Appellee.

HODGES, J., dissenting from denial of certiorari:

I would grant certiorari to address the constitutionally Senate Bill 1121 in light of the approval of Initiative Petition Number 348 amending section 33 of article 5 of the Oklahoma Constitution.

In 1992, the people of Oklahoma approved Initiative Petition Number 348, which amended section 33 of article 5 of the Oklahoma Constitution, to require all revenue raising bills to be approved by a majority of the people at the next general election or by a three-fourths vote of each house of the Oklahoma Legislature. Okla. Const. art. 5, § 33; *see In re Initiative Petition No. 348*, 820 P.2d 772,774 (Okla. 1991). The ballot title reflects the intent of the people of Oklahoma to

require *any revenue raising bill* to be approved in the manner mandated by the Initiative Petition.

The Oklahoma Tax Commission has estimated that Senate Bill 1121 (codified at Okla. Stat. tit. 68, § 2362 (Supp. 1994)) would raise approximate $18 million dollars in revenue, most of which would go into the general fund. The effect of Senate Bill 1121 is to increase the taxes of a significant number of nonresidents and part-time residents. Nonetheless, the Court of Civil Appeals found that Senate Bill 1121 did not violate article 5, section 33, even though it did not go to a vote of the people and did not receive three-fourths vote of each House.

The Oklahoma Legislature attempts to circumvent the constitutional limits on its power by couching the bill's purpose as revenue-neutral even though it is raises an estimated $18 million in taxes. The Legislature cannot do indirectly that which is otherwise prohibited. *Lepak v. McClain*, 844 P.2d 852, 854 n. 11 (Okla. 1992). In *Trapp v. Cook Construction Company*, 105 P. 667, 671 (Okla. 1909), this Court stated: "[A]n act in evasion of the terms of the Constitution . . . frustrating its general and clearly expressed or necessarily implied purpose is clearly void as if in express terms forbidden. . . ."

When the people of Oklahoma approved Initiative Petition 348, they clearly intended to limit the Oklahoma Legislature's power to enact "any revenue raising bill." *In re Initiative Petition No. 348*, 820 P.2d at 778 (Okla. 1991). Senate Bill 1121 frustrates this intent and is void. By allowing Senate Bill 1121 to stand, this Court is allowing the Oklahoma Legislature to do indirectly what it is constitutionally prohibited from doing directly.